Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-171

FREDERICK A. SMITH and MARILYN G. SMITH,
Petitioners,

v.

CARLOS L. JARAMILLO, Director, New Mexico
Department of Alcohol Beverage Control.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of New Mexico

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of New Mexico

The petitioners, FREDERICK A. SMITH and MARILYN G. SMITH, pray that a writ of Certiorari issue to review the opinion and judgment of the supreme court of the State of New Mexico rendered in these proceedings on April 21, 1976.

OPINION BELOW

The supreme court of the State of New Mexico entered a decision on April 21, 1976, affirming the lower court judgment and entered their mandate on May 3, 1976, and this decision and mandate appear in Appendix A, infra, pages A-1 to A-2. This decision was rendered without opinion and is as yet unreported.

JURISDICTION

The decision of the supreme court of New Mexico was entered April 21, 1976, and the mandate was entered May 3, 1976. See Appendix A, p. A-1, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

Petitioner filed suit appealing the decision of the New Mexico Liquor Director denying the issuance of a dispenser's liquor license for the Village of Williamsburg, New Mexico, an incorporated municipality which has no liquor license within its corporate limits. The liquor director denied the liquor license pursuant to the quota provisions of Section 46-5-24, N.M.S.A. of the New Mexico Liquor Control Act which provides that incorporated municipalities shall be granted one dispenser's liquor license "for each two thousand (2,000) or major fraction thereof population in such municipality." The trial court dismissed the petition with prejudice and the New Mexico Supreme Court affirmed thus precluding the Village of Williamsburg from ever having a liquor license within its corporate limits until meeting the alleged statutory population requirements.

At least 26 other municipalities in New Mexico similarly situated as the Village of Williamsburg in population enjoy the privilege of having at least one liquor license.

The question thereby arising is: Does an interpretation of the New Mexico Liquor Control Act holding that an incorporated municipality cannot have at least one liquor license until meeting a 2,000 population quota violate the constitutional guaranties that laws must operate uniformly and that citizens are entitled to equal protection of the law? Is this especially true when numerous other municipalities under the population quota now enjoy the privilege of having at least one liquor license?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV, Section One:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article II, Section 18, New Mexico State Constitution:

> "No person shall be deprived of life, liberty of property without due process of law; nor shall any person be denied the equal protection of the law."

Section 46-5-24, N.M.S.A., of the New Mexico Liquor Control Act provides in pertinent part as follows:

> "The *Maximum number* of licenses to be issued under the provisions of sections 46-5-2, 46-5-3 and 46-5-11 New Mexico Statutes Annotated, 1953 Compilation, shall be as follows:
>
> (a) In incorporated municipalities, not more than one (1) dispenser's or one (1) retailers or one (1) club license for each two thousand (2,000) or major fraction thereof population in such municipality."

Section 46-5-3-1, N.M.S.A., of the New Mexico Liquor Control Act:

> "A dispenser's, retailer's or club license which at any time prior to the effective date of this section was reclassified,

converted or changed from any other type or class of liquor license recognized under the laws of this state, and any renewal of such license, is hereby confirmed and made valid * * *."

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

There is not now and there never has been any dispenser, retail or club liquor license within the area of the corporate limits of the Village of Williamsburg, New Mexico. (Tr. 18) And if this decision is not reversed there never will be under the present population level.

On or about May 17, 1973, petitioners filed with the respondent liquor director an application for the issuance of a new dispenser's liquor license to be located within the municipal or corporate limits of the Village of Williamsburg, Sierra County, New Mexico, an incorporated municipality. (Tr. 17-18) This application for a dispenser's liquor license was approved and endorsed unanimously by the Board of Trustees as the governing body of the Village of Williamsburg, New Mexico (Tr. 18). This application complied with all legal requirements concerning the location of a proposed dispenser's liquor license and in particular the proposed location was a greater distance from any church, school or military institution as required by the New Mexico Liquor Control Act. (Tr. 18) All requirements of law with regard to the posting of notices and publication of notices and a public hearing for the application were complied with and satisfied. (Tr. 18)

The population of the Village of Williamsburg as last determined by the United States Bureau of Census, was: 367. (Tr.

18) There are numerous incorporated municipalities located in the State of New Mexico having less than 1,000 population—(ranging as low as 21 population in the case of Greenville, New Mexico)—and further having either a dispenser or retail license situated within the corporate limits of such municipalities. (Tr. 19) The following is a list of such municipalities under 1,000 population and having at least one liquor license situated within their corporate boundaries:

Municipality	Population	Municipality	Population
Hagerman	953	San Jon	308
Dexter	746	Chama	899
Maxwell	393	Cuba	415
Vaughn	867	San Ysidro	182
Roy	476	Pecos	598
Mosquero	244	Red River	201
Tatum	982	Willard	209
Capitan	439	Estancia	721
Corona	262	Moriarity	758
Columbus	241	Encino	250
Wagon Mound	630	Des Moines	204
Cloudcroft	525	Greenville	21
Logan	386	Los Lunas	973

The essential facts involved herein are not disputed. The sole question is whether or not the state court should be reversed because by affirming respondent's denial of the application for a dispenser's liquor license for the Village of Williamsburg, the law of this case would *forever* prohibit the issuance of a liquor license for the people of Williamsburg, New Mexico at its present population level.

The respondent liquor director denied the petitioners application for a dispensers liquor license on the grounds that the Vil-

lage of Williamsburg could not have at least one liquor license until meeting the population provisions of the New Mexico Liquor Control Act. This action was affirmed on the same grounds by the District Court of Santa Fe County, New Mexico, sitting as the trial court and the trial court's decision was in turn affirmed by the New Mexico Supreme Court without opinion. (Appendix A, pages A-1 to A-2).

Petitioners have contended that in order to meet the constitutional standards of uniformity in the operation of the law and equal protection of the laws the New Mexico Liquor Control Act providing for a quota of one liquor license per 2,000 population or major fraction thereof, cannot be interpreted to eliminate the granting of at least one liquor license to a municipality under 1,000 population when many other similarly situated municipalities under 1,000 population enjoy the privilege of having at least one liquor license. This federal question was raised during the trial on the merits and by filing requested findings of fact and conclusions of law at the trial court level. (Tr. 35-36) This was the sole grounds urged for reversal on appeal to the Supreme Court of New Mexico.

REASONS FOR GRANTING THE WRIT

1. **The Decision Below Denying at Least One Liquor License for the Village of Williamsburg When Many Other Municipalities of the Same or Similar Population Have Such a Liquor License Violates the Equal Protection of the Law and Uniformity of Operation of the Law Constitutional Guarantees.**

Section 46-5-24, N.M.S.A., of the New Mexico Liquor Control Act provides in pertinent part as follows:

> "The *maximum number* of licenses to be issued under the provisions of section 46-5-2, 46-5-3 and 46-5-11 New Mexico Statutes Annotated, 1953 Compilation, shall be as follows:
>
> (a) In incorporated municipalities, not more than one (1) dispenser's or one (1) retailers or one (1) club license for each two thousand (2,000) or major fraction thereof population in such municipality."

The above quoted statutory section was relied upon by the lower court as the basis for denying a liquor license for Williamsburg. (Tr. 21) Under the recent ruling by the supreme court of New Mexico in the case of *City of Santa Rosa v. Jaramillo*, 85 N.M. 747, 517 P2d 69, no transfer of a liquor license from outside the corporate boundaries of the Village of Williamsburg can ever be made to within the corporate limits of the Village. Therefore, under the present population of the Village of Williamsburg it is legally impossible to ever have a liquor license within the corporate limits of the Village. This abortive result of the lower court's decision in the case at bar flies in the face of the express wishes of the citizens of Williamsburg whose Board of Trustees unanimously voted in favor of having a liquor license for their Village. (Tr. 18) Twenty-six other municipalities in the State of New Mexico with populations of less than 1,000

and ranging down to as little as 21 inhabitants enjoy the privilege of having at least one liquor license within their corporate boundaries. (Tr. 19) If the constitutional guaranty of uniformity in the operation of the law for all citizens is to be protected, the lower court's decision in the case at bar must be reversed.

The case of *Cox v. Timm*, 182 Ind. 7, 105 N.E. 479 involved a construction of section 4 of the Proctor Liquor Law quoted at page 480 of the opinion as follows:

> "That the number of retail licenses which may be granted in any city or township under this act shall not be more than one for each five hundred inhabitants thereof, which number may be further limited by the board of county commissioners of any county to any number not less than one to each one thousand inhabitants of such city or township."

The board of commissioners of Pulaski County exercised their delegated authority and fixed 1,000 persons as the measure of the number of retail liquor licenses for any city or township of the county. Timm applied to the board of commissioners of Pulaski County for a retail liquor license in Cass Township of the county which had a population of more than 500 but less than 1,000. Cox and others protested on the grounds that under the above statute no retail liquor license could be granted since the Cass Township was under the 1,000 statutory limitation. The board rejected the license application but on appeal to the circuit court the board's action was reversed and a judgment was entered granting the license. In affirming the appeal court stated as follows in the body of the opinion at pages 481 to 482:

> "The question to be answered, therefore, is whether, in view of the other provisions of the act and of other laws relating to the same subject-matter, the positive prohibition of the sale of intoxicating liquors by the Legislature, or by the

board of commissioners exercising a delegated authority in townships of less than 500 or 1,000 inhabitants, as the case may be, is fairly within the terms of the proviso when viewed in the light of the legislative intent.

(4, 5) The fact that the public policy of the state with reference to the liquor traffic, as declared by the Legislature almost uniformly during the history of the state, has been to regulate and restrict by license and other laws, and not to prohibit the sale, is not without significance in the construction of the provisions now under examination. McPherson v. State (1910) 174 Ind. 60, 90 N.E. 610, 31 L.R.A. (N.S.) 188. Aside from the effect of the isolated words of the proviso in question, the general scope and purpose of the whole Proctor law are obviously of that character. There is not elsewhere in the act any indication of any purpose to establish prohibition of any sort limited in territory or otherwise, but a pervading intention to authorize licenses coupled with stringent regulation generally throughout the state. The construction of the proviso contended for by appellants would put it in discord with the purpose to be gathered from the purview of the act. And there is more specific antagonism between this construction of the proviso and other parts of section 4, supra, itself. In a later proviso in this same section it is declared that licenses granted under the prior law and in force at the time of the passage of the act shall not be affected by the provisions of the act, but shall remain in force and be subject to renewal from year to year. The preceding law under which such existing licenses were issued contained no legislative fiat declaring that licenses should not be granted in townships containing less than 500, or delegating authority to board of county commissioners to double the unit of numbers. And if in such townships licenses had been granted, the Legislature thus provided for their preservation and renewal from year to year indefinitely.

From this it appears that the construction which counsel for appellants ask us to approve and declare to be the correct one would establish a conflict between this later proviso and the one under consideration for the latter, when so construed, would wholly prohibit the sale under license in townships under the fixed numerical standard, while the former would permit it and a continuation of it indefinitely, if there were existing licenses granted under a prior law. Between a construction which would create conflict in the provisions of a law and one which would bring harmony, the choice is always to be, if practicable, the latter.

But the construction contended for would do more than destroy the harmony of purpose which pervades the act.

'Laws of a general nature are such as relate to a subject of a general nature, and a subject of a general nature is one that exists, or may exist, throughout the state, or which affects the people of the state generally, or in which the people of the state have an interest.' 1 Lewis' Sutherland on Stat. Const. (2d Ed.) § 197.

The law before us clearly was intended by the Legislature to be a general law. Such a law must operate uniformly throughout the state. Const. art. 4 § 23. Now if the first of the provisos under consideration is to be construed as forbidding the licensing or the sale at retail of intoxicating liquors in townships under the fixed numerical measure and the second one, as it clearly does, authorizes licenses in such townships where they existed at the time of the passage of the act, the uniform operation of the law is destroyed, for it permits license in one township and denies it in another where the circumstances and conditions are the same. In one the sale may be licensed indefinitely while the law remains in force, unless prevented by remonstrance or local option election, while in the other it can never be, even though authorized by local option election. Doubtless the

Legislature might, in the exercise of the police power, provide by law that the sale of intoxicating liquors should not be licensed in any rural township of the state which contains fewer than a fixed number of inhabitants, where a reason inhered in the classification, such as the absence in such communities of adequate police protection. But it could not, without a palpable violation of the Constitution enact a law which would authorize license in all townships containing a population under a fixed number south of the National Road in the state, and forbid it in all like townships north of that line in the state. While this illustration puts the matter more baldly, it is not different in legal effect from the instance under consideration.

(6) It is, of course, true that a law satisfies the constitutional provision requiring uniformity of operation if it operates the same in all parts of the state where the same circumstances and conditions exist. Groesch v. State (1873) 42 Ind. 547; Pennsylvania Co. v. State (1895) 142 Ind. 428, 41 N.E. 937; Smith v. Board (1910) 173 Ind. 364, 90 N.E. 881. But this law would not so operate if the construction contended for should be established. The Legislature was under no compulsion to save existing licenses, and they can be considered no part of the circumstances and conditions' under which the law must operate. Laws which prohibit the granting of a license to sell within a stipulated distance of a church or schoolhouse or in residence districts of cities and towns, and which are intended to operate generally throughout the state, are not to be classed as local laws, for they would operate uniformly throughout the state wherever residence districts in cities and towns or churches or schoolhouses are found. And whenever a church or schoolhouse or a residence district in a city or town in any part of the state should become an entity where none had been before, the law would be in existence there and operative. In other words, they would operate uniformly throughout the state where the same

circumstances and conditions existed. In the instance before us under construction contended for there could never be other than arbitrary unequal operation.

(7) If, then, we are to concede the construction contended for, we are to have under the law licensed saloons authorized in some townships of the state and positively forbidden in others of exactly the same class. And as this construction brings about provisions in the law which are in the particular under consideration conflicting in effect, one of them must give way to save the law from the objection of lack of uniform operation. In such case, if the conflict is irreconcilable, the intention embodied in the provision latest in position in the law, and therefore last in order of time, is deemed to prevail. State ex rel. v. Board (1908), 170 Ind. 595, 85 N.E. 513, and authorities there cited. . . .

(8) Statutes are to be construed as to sustain their constitutionality rather than to place upon them a construction which would render them invalid. . . .

(9) Effect should be given to every word and clause of a statute, if possible . . . It is because one intent of the Legislature must be declared and sustained by the courts when discovered, and because it is to be presumed that the Legislature intended that all of the provisions of an act are to be effective, that courts must, when it can be done, so construe a law as to give effect to all of its provisions and save any part of it from invalidity. These well-settled rules of statutory construction and interpretation forbid the acceptance of the contention of appellants, and require a contrary conclusion, which leaves the law hormonious, fully effective, and valid."

The vintage of the *Cox v. Timm* case cannot affect its cogent reasoning when applied to the case at bar. The lower courts

decision in denying a liquor license for the Village of Williamsburg when numerous other municipalities in New Mexico of less than 1,000 population have liquor licenses cannot stand—the New Mexico Liquor Control Act must have equal operation in the State to stand the test of constitutionality and the lower court should have followed a statutory interpretation which sustains constitutionality. *Community Public Service Co. v. New Mexico Publ. S. Com'n*, 76 N.M. 314, 414 P. 2d 219; *Abeytia v. Gibbons Garage*, 26 N.M. 622, 195 P. 515; *State ex rel. Clancy v. Hall, State Treasurer*, 23 N.M. 422, 168 P. 715.

Section 46-5-3.1, N.M.S.A. of the New Mexico Liquor Control Act confirmed and validated all prior annual renewals of liquor licenses "prior to the effective date of this section." Thus 26 other municipalities in New Mexico having less than one thousand population have been permanently allowed the privilege of retaining a liquor license within their corporate boundaries. This presents the identical fact situation of the Cox v. Timm case—and the denial of a liquor license to the Village of Williamsburg by the lower courts in the case at bar violates likewise the principles of uniformity and equal protection because "If, then, we are to concede the construction contended for, we are to have under the law licensed saloons authorized in some townships of the state and positively forbidden in others of exactly the same class. And as this construction brings about provisions in the law which are in the particular under consideration conflicting in effect, one of them must give way to save the law from the objection of lack of uniform operation."

Federal and state constitutional guaranties of equality with reference to class legislation based upon population require that —"All who are in situations and circumstances which are relative to the subjects of the discriminatory legislation and which are indistinguishable from those of the members of the class must be brought under the influence of the law and treated by

it in the same way as are the members of the class." 16 Am. Jur. 2d, Constitutional Law Sec. 503, p. 882.

This conclusion comports with the principle enunciated by this Court in Yick Wo v. Hopkins, 118 U.S. 220, 30 S. Ct. 356, at page 226 that *"the equal protection of the laws is a pledge of the protection of equal laws."*

Clearly the New Mexico Liquor Control Act as construed by the lower courts in the case at bar does not grant "the protection of equal laws;"—indeed it creates an individous discrimination in the law by confirming existing liquor licenses in 26 communities with less than 1,000 population while denying at least one liquor license for the Village of Williamsburg based upon the statutory quota or population classification.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Mexico State Supreme Court.

Respectfully submitted

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APPENDIX

In the Supreme Court of the State of New Mexico

Wednesday, April 21, 1976

Frederick A. Smith and Marilyn G. Smith,
Petitioners-Appellants,
vs.
Carlos L. Jaramillo, Director, Department of Alcoholic Beverage Control,
Respondent-Appellee.

No. 10601.

Appeal From District Court Santa Fe County

DECISION

The Judgment of the District Court of the First Judicial District is affirmed.

It Is So Ordered.

Donnan Stephenson, Justice

We Concur:

John B. McManus, Jr., Justice

Dan Sosa, Jr., Justice